Supreme Court, U.S.
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No. 95-1842

In The

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. MERRETT, and CECILIA A. CLAYTON, as personal representative of the estate of SOLOMON CLAYTON, JR., on their own behalf and on behalf of all others similarly situated, PETITIONERS

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement, ROBERT DEMPSEY, individually FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles, ROBERT BUTTERWORTH, and LAWRENCE CROW, JOHN M. ERWIN, and JERALD VAUGHN, CITIES OF LAKELAND, MAITLAND, AND LARGO POLICE DEPARTMENTS, RESPONDENTS

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SECOND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The Court's Recent Decision In *Whren V. United States* Strongly Supports Summary Reversal Of The Decision Below Or A Remand; Alternatively, Certiorari Should Be Granted To Consider The Critical Issue Not Directly Decided In *Whren*

On June 10, 1996, this Court decided *Whren v. United States*, ___ U.S. ___, 64 U.S.L.W. 4409 (1996), which strongly suggests that the decision below ought to be reversed summarily or remanded for reconsideration in light of *Whren*. Alternatively, to the extent that *Whren* did not directly decide the issues in this case, certiorari review is warranted to consider the important issues raised in this case.

Petitioners previously filed a supplemental petition on the potential impact of *Whren* on this case when we learned that *Whren* was pending before the Court. That supplemental petition set out the differences and similarities between *Whren* and this case. Our supplemental petition posited that one of the most important differences between the two cases was the fact that the stops in *Whren* were probable cause based; the stops in this case were made without any probable cause and, indeed, without any suspicion whatsoever. As it happened, this distinction was the focal point of the Court's decision in *Whren*, where the Court held that "pretext" is not an issue in probable cause based seizures, but remains a consideration in seizures not made on probable cause, such as the roadblocks in this case.

In *Whren*, this Court held that when a stop is based on probable cause, it matters not that the officer may have had some other motivation for the stop or may have engaged in "pretext". In such cases, no Fourth Amendment balancing is required because probable cause will almost always justify a seizure.[1] Absent the need to engage in balancing, the inquiry was easily solved:

> For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

64 U.S.L.W. at 4413.

The issue of "pretext" remains highly relevant, however, in stops not made on probable cause. Indeed, the *Whren* Court expressly distinguished roadblock cases – such as the one at bar – from probable cause stops, such as the one in *Whren*:

> It is of course true that in principle every Fourth Amendment case, since it turns on a reasonableness determination, involves a balancing of all relevant factors. With rare exceptions not relevant here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause. That is why

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[1] There are several exceptions to this rule noted by the Court in *Whren*, which were inapplicable to the facts there and which do not pertain to the instant case either.

> petitioners must rely upon cases like *Delaware v. Prouse*, 440 U.S. 648 (1979) to provide examples of actual balancing analysis. There, the police action in question was a random traffic stop for the purpose of checking a motorist's license and vehicle registration, a practice that – like the practices at issue in the inventory search and administrative inspection cases upon which the petitioners rely in making their "pretext" claim – involves police intrusion *without the probable cause that is its traditional justification*. Our opinion in *Prouse* expressly distinguished the case from a stop based on precisely what is at issue here: "probable cause" . . . What is true of *Prouse* is also true of other cases that engaged in detailed "balancing" to decide the constitutionality of automobile stops, such as [U.S. v.] Martinez-Feurte, 428 U.S. 543 (1976), which upheld checkpoint stops, and [U.S. v.] Brignioni-Ponce, 422 U.S. 873 (1975), which disallowed so-called "roving patrol" stops: ***the detailed "balancing" analysis was necessary because they involved seizures without probable cause***.

Id. at 4412 (first emphasis is original, second supplied). Thus, *Whren* expressly and plainly holds that the

validity of the seizures in the case at bar, like those in *Prouse*, *Martinez-Feurte*, and *Brignioni-Ponce* – and unlike those in *Whren* – does not rise and fall with the question of whether the government has a right to make the seizure; rather, that right must undergo the detailed Fourth Amendment "balancing" test, which includes the "pretext" analysis repeatedly referenced in numerous precedents of this Court, many of which were cited approvingly in *Whren*. *E.g.*, *Florida v. Wells*, 495 U.S. 1,4 (1990); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *New York v. Burger*, 482 U.S. 691, 716-17 (1987); *Colorado v. Bannister*, 449 U.S. 1 (1980); *Texas v. Brown*, 460 U.S. 730 (1983)(a roadblock case); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

Thus, at the very least, *Whren* teaches that the seizures in the case at bar must undergo the balancing test *and* that the balancing test includes an examination of whether the seizure was "to be used as a ruse for a general rummaging in order to discover incriminating evidence," *Florida v. Wells*, *supra*, or as "a pretext for obtaining evidence of violation of penal laws." *New York v. Burger*, *supra*.[2] *Whren* also affirms the axiom that where a pretextual motive is behind an administrative seizure made without probable cause, the seizure fails the Fourth Amendment balancing test: "[W]e have never held, *outside the context of inventory*

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[2] In *Burger*, this Court wrote:

> There is, furthermore, no reason to believe that the instant inspection was actually a "pretext" for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made ***solely*** pursuant to the administrative scheme.

Id. at 717 n. 27 (emphasis supplied).

search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment. . ." *Whren* at 4411. This language seems to affirm the principles of *Wells*, *Bertine*, and *Burger* that pretext *will* invalidate a facially valid inventory or administrative inspection, such as a roadblock.[3]

Although the Eleventh Circuit panel below purported to apply a balancing test, it declined to consider the pretextual motives of Respondents, saying that "the pretext analysis, as set out in our precedents, does not fit the roadblock case." Pet. App. at 6 n. 20.[4] Indeed, the Eleventh Circuit's failure to include the "pretext" analysis in the weighing process was one of the chief complaints of the *en banc* dissenters, who have now been vindicated by *Whren*.

Thus, the opinion below is contrary to and inconsistent with *Whren*, creating irreconcilable conflict between the two decisions. Summary reversal based upon *Whren* is in order; alternatively, a remand for

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[3] Although *Whren's* language stating that "pretext" analysis must be employed in administrative cases – such as seizures made at driver's license roadblocks – is arguably only dicta, this language was quite central to the holding of Whren and does not seem to have been cavalierly used. The Court drew a fairly bright line in explaining that "pretext" analysis does not apply in probable cause based seizures, but continues to apply in administrative and inventory seizures.

[4] The panel below had the law precisely backwards: it held that "pretext" analysis applies in probable cause stops made by individual officers, but that it does not apply in non-probable cause stops made at driver's license roadblocks. Of course, *Whren* teaches that precisely the opposite is true.

reconsideration in light of *Whren* would also be appropriate. Should the Court believe that the question of the validity of pretextual roadblock seizures still exists in *Whren*'s aftermath, then certiorari ought to be granted to resolve this important issue.[5]

CONCLUSION

The decision below ought to be summarily reversed or remanded for further consideration based upon Whren; alternatively, the petition for writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1996

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[5] In Respondent's Response to this Petition for Writ of Certiorari, they rely heavily upon their self-serving affidavit that their planned future roadblock stops designed to intercept drugs will be carried out slightly differently so as to lessen the inconvenience to those seized. However, this claim ought to make little difference in light of the pretextual nature of such stops, as condemned by *Whren* and the cases cited therein.